RECORD
AND
BRIEF

Supreme Court, U.S.
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No. 09-1219

IN THE

Supreme Court of the United States

Cecil G. Bailey

Petitioner

v.

Lorraine Caldwell, as Personal Representative
Of the Estate of Virgil Earnest Bailey

Respondent

On Petition For Writ Of Certiorari To
The District Court of Appeals of The State of Florida
For the Second District

PETITION FOR REHEARING

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Additional Questions Presented

1. Is the stipulation null and void? Was there "no meeting of the minds" in regards to the nature and scope of the stipulation entered between the parties?

2. Has an erroneous deprivation of petitioners property rights occurred?

3. In order to ensure petitioners procedural due process rights were not violated, should the state have required a hearing on the admissibility of decedents mental disability hospital records prior to accepting the stipulation? Does petitioner have a property right interest in decedent's mental disability hospital records?

4. Should respondent's failure to release decedent's mental disability hospital records to the probate court have been a basis for her removal as personal representative to the decedent's estate?

5. Pertaining to Cecil's request for a written opinion, has the state created an "irrebuttable presumption" of incompetence under the equal protection clause of the 14th amendment, by enacting Fla. Rule 9.330?

6. Does Lorraine's "intrinsic fraud" of not revealing the value of Virgil's estate to Cecil offer substantial grounds not previously presented for a rehearing?

Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, petitioner state that all parties appear in the caption of the case on the cover page.

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Petition for Rehearing

A careful analysis of the Petition for Writ of Certiorari has resulted in Petitioners request to add "questions presented", with commentary to follow, for the U.S. Supreme Court's review.

A Null and Void Stipulation

Cecil failed to mention the void stipulation as one of the questions presented. Cecil feels that by adding the void stipulation as a main issue in his case would serve as an intervening circumstance of a substantial effect.

Cecil wants this court to know that he is the only heir of the six remaining intestate heirs (not including Lorraine) who signed the stipulation and he is legally blind. In the stipulation, Mr. Rydberg included the attorney for Masonic Home but did not include any of the remaining intestate heirs. Since the five remaining intestate heirs did not sign the stipulation, Cecil cites McGoey v. State, **supra**, to show this court that there was "no meeting of the minds" in regards to the nature and scope of the stipulation.

Cecil feels that Lorraine's failure to release Virgil's medical records is "extrinsic fraud" or fraud on the court which amounts to a fraudulent inducement of the contract. Cecil would like this court to recognize that: 1) the fraudulent inducement, 2) the lack of signatures of the (5) five remaining intestate heirs, and 3) Cecil's legal blindness are evidence that.there was "no meeting of the minds" in

regards to the nature and scope of the stipulation entered between the parties. McGoey v. State, **supra**.

An Erroneous Deprivation of Cecil's Property Rights

Cecil feels that due to Lorraine's fraud on the court, the U.S. Supreme Court should recognize the risk of an erroneous deprivation of his private property interest. Mathews v. Eldridge, **supra**. By making the assertion that an erroneous deprivation of his property rights a main issue of the case, Cecil alleges this deprivation to be an intervening circumstance of a substantial effect that this court should consider. Cecil cites Sniadach v. Family Finance Corp., **supra**, where the court held that Wisconsin's prejudgment garnishment of wage procedure, with its obvious taking of property without notice and prior hearing, violates the fundamental principles of procedural due process.

No hearing was ever afforded to Cecil pursuant to his request for Lorraine to produce Virgil's medical records. This amounted to a taking of Cecil's property without due process of law. Cecil's position is that the probate court should not have accepted the stipulation without ruling on his pending motion requesting Lorraine to produce Virgil's medical records. This lack of hearing on Cecil's pending motion to produce Virgil's medical records prevented Cecil from presenting his case in court. Declare v. Yohanan, **supra**.

Cecil's Procedural Due Process Rights

Cecil knows that there must be a property right for him to request constitutional protections.

Cecil cites Fla. Stat. 732.101(2), (2002), Huskea's Estate v. Doody, **supra,** to state that the decedent's death is the event which vests an heir's right to intestate property. By not requiring Lorraine to produce Virgil's mental disability hospital records, the state deprived Cecil of his property right entitlement. No hearing was ever held in response to Cecil's request for Lorraine to produce Virgil's medical records. This lack of hearing on Cecil's request for these records deprived Cecil of his legitimate claim or entitlement in respect to his property interest. Board of Regents v. Ross, 408 U.S. 564 (1972), Bell v. Burson, **supra**. In Perry v. Sindermann, 408 U.S. 593 (1972), the court held that though a subjective "expectancy" of job tenure is not protected by procedural due process, respondents allegation that a property right or tenure policy arose because of rules and understandings officially promulgated and fostered, obligated the college to afford a hearing before termination.

Cecil directs the courts attention to Roberts v. Baker, **supra**, to show this court that Georgia's Supreme Court held that a doctor can review the medical records of a testator without ever personally examining him and based on his medical experience and review of the medical records can render opinions of the testators mental capacity. In addition Utah's Supreme Court addressed medical records in the case of In re Richards Estate, **supra**, and held: "These records are relied upon for the treatment of patients and the preservation of human life. Any motives for falsifying them by doctors or staff appear to be lacking." These two state supreme court cases provide case law upon which precedent can be

established. Black's law dictionary's 9th edition provides the following definitions:

precedent 1) The making of a law by a court in recognizing new rules while administering justice. promulgate 2) To put (a law or decree) into force or effect. decree 2) A court's final judgement.

Cecil feels that his interest in Virgil's mental disability hospital records in a will contest in which Virgil's mental capacity is in issue should afford him the constitutional protections of procedural due process. Case law precedent established in these two state supreme court cases, pertaining to a testators mental capacity, should show this court that rules and understandings officially promulgated exist for a legitimate claim for a property right entitlement. Perry v. Sindermann, **supra**. Cecil has a "property" interest in Virgil's mental disability hospital records. Florida's Supreme Court held in Declare v. Yohanan, **supra** , that "extrinsic fraud" occurs when a litigant has somehow been prevented from participating in the case. Florida's probate judge should have required a hearing and made a ruling on the admissibility of Virgil's mental disability hospital records before accepting the stipulation to insure Cecil was afforded due process of law. Perry v. Sindermann, **supra**, Board of Regents v. Roth, **supra**.

Cecil was a civil appellate pro se litigant. He knows his appeal to Florida's 2nd DCA was not perfect. However, his allegation of Lorraine's fraud on the court or "extrinsic" fraud for failure to produce Virgil's mental disability hospital records is an intervening circumstance of a substantial effect that this court should consider. Cecil cites Pio v. Ramsier, 623 N.E. 2d 174 (Ohio App. 9 Dist. 1993), where it

was held that since there were allegations of the testators mental competency and that the testator may have been subject to undue influence, an executor's refusal to waive the physician patient privilege may be a basis for the executor's removal.

As the personal representative of Virgil's estate, Lorraine had a fiduciary duty to allow release of Virgil's mental disability hospital records to the probate court. The probate court should have required a hearing on Cecil's motion to produce these medical records before accepting the stipulation, in order to ensure Cecil's procedural due process rights were not violated. Pursuant to Pio v. Ramsier, **supra**, Lorraine's failure to release Virgil's medical records should have been a basis for her removal as personal representative.

An Irrebuttable Presumption of Incompetence

In Cleveland Board of Education v. LaFleur, **supra,** the court ruled that if the government "presumes facts" against a person so that he is not qualified for some important benefit or right, the irrebuttable presumption may be unconstitutional. Cecil previously referenced that the state created an irrebuttable presumption of incompetence when a civil appellant pro se litigant is placed in the rational basis standard regarding a request for a written opinion.

Cecil would now like to make this "irrebuttable presumption" a main issue (questions presented) of this case. Cecil feels that by making his claim that the state created an "irrebuttable presumption" of incompetence when a civil appellant pro se litigant requests a written opinion instead of his previous

position as "a response to being placed in the rational basis standard", would serve as an intervening circumstance of a substantial effect. This would enable the U.S. Supreme Court to determine whether Fla. Rule 9.330 is unconstitutional because it creates an irrebuttable presumption of incompetence for a civil appellant pro se litigant who seeks a written opinion. Cecil's position is that Fla. Rule 9.330 creates an unconstitutional irrebuttable presumption of incompetence for a civil appellate pro se litigant no matter what classification he lands in.

Cecil previously cited Vlandis v. Klein, **supra,** to show the court that "permanent and irrebuttable presumptions have long been disfavored under the due process clauses of the 5th and 14th amendments." Cecil also feels that the state's failure to provide a written opinion created an irrebuttable presumption of incompetence incapable of being overcome. Carrington v. Rash, **supra**. Cecil was not afforded the same consideration for a written opinion that an attorney would receive under the same or similar circumstances. Cecil would not have brought this issue before this court if he did not feel that an attorney would have received a written opinion upon request in this case. By being pro se, Cecil could not overcome the state's irrebuttable presumption of incompetence.

Fla. Rule 9.330 appears neutral on its face and in its application. However, the lawmaking body has enacted or maintained this law for a discriminatory purpose. Cecil understands that the Florida Bar Appellate Court Rules Committee and the Florida Supreme Court has the state government's interest of fiscal and administrative efficiency in mind. Mathews v. Eldridge, **supra.**

However, Cecil wants this court to recognize that Florida's 2nd DCA discriminated his request for a written opinion based on the fact that he was not represented by an attorney. Cecil would like to cite Village of Willowbrook v. Grace, **supra,** to remind this court that equal protection claims may be brought by a class with as few as one member. Cecil feels his case is unique for the following reasons: 1) this is a civil case, 2) a will contest with a void stipulation due to fraud in the inducement of the contract, 3) several instances of fraud on the court exist which makes the state responsible for the taking of Cecil's property without due process of law, 4) Cecil feels he has a property interest in Virgil's medical records, and 5) Cecil is legally blind.

Fraud on the Court

Cecil would like to briefly explain a few areas of fraud that should be considered.

The improperly addressed certified letter to inform "interested parties" under the probate code was not specifically mentioned in Cecil's appeal to Florida's 2nd DCA. Cecil simply stated to the appellate court that he was not notified about the probate proceedings until October 28, 2004.

Cecil requests that the U.S. Supreme Court take a closer look at the way this case started. A certified letter was sent to Cecil's address to C.G. Patterson instead of C.G. Bailey, so Cecil did not accept the letter. Cecil wants this court to understand that the very first letter was an act to conceal the proper notice Cecil was entitled to receive. Fla. Stat. 731.301 (2), (2002).

The case was being run through the probate court at a rapid pace until a stipulation was entered. After the stipulation, Lorraine waited two years before submitting the final accounting and that was only after Judge Sexton entered an order to show cause. Cecil thinks that the time lapse was due to Lorraine's "intrinsic fraud" of covering up the value or extent of the estate. Cecil feels that after he was fraudulently induced to sign the stipulation, Lorraine took her time before submitting a final accounting in order to mislead Cecil regarding the extent and value of Virgil's estate.

In Arrieta-Gimenez v. Arrieta-Negron, **supra,** the party's five children of the decedent reached a property settlement which resolved a dispute over the division of their late father's estate. The appellant, one of the children accepted the offer, and the settlement was reduced to a consent judgement. Three years after the consent judgement, the appellant discovered that she had been misled about the extent of the father's holdings in Puerto Rico and attempted to set aside the settlement. After examining the record, Florida's Supreme Court found that the complained of conduct, if proven, was the type considered to be intrinsic fraud. The appellant had "every right to reject the settlement until after she could adequately explore the extent of her father's holdings in Puerto Rico." Here, the stipulation was never reduced to a consent judgement. Cecil appealed the probate court's ruling to Florida's 2nd DCA, has had his Petition for Writ of Certiorari denied by the U.S. Supreme Court, and offers Lorraine's "intrinsic fraud" pertaining to the value of Virgil's estate as substantial grounds for a rehearing not previously presented.

Cecil's letter to Judge Sexton dated August 10, 2008, seeking an independent audit and dismissal of order approving final accounting was interpreted by a different Judge Isom to be a motion for a rehearing. By interpreting Cecil's letter to be a motion for rehearing, Judge Isom violated Cecil's rights to procedural due process. This letter was addressed to Judge Sexton, but interpreted to be a motion for rehearing and denied by a different Judge Isom on August 20, 2008, without the benefit of a hearing.

Cecil would like to direct this courts attention to Mr. Rydberg's letter to Judge Isom dated October 19, 2009. This letter with a proposed order was pursuant to a "dismissal docket" hearing, that would have discharged the personal representative "nunc pro tunc" to July 31, 2008. At the time of this letter, the appeal was still pending. Cecil wants this court to know that it appears Lorraine was trying to tangle the case up in case the appellate court ruled in Cecil's favor. This order went unsigned, but the U.S. Supreme Court should understand that: 1) the appeal was still pending 2) Cecil was vulnerable because he was pro se and 3) a closer reading of the proposed order would reveal that it was not presented in good faith.

Cecil has repeatedly stated and provided case law to show this court that Lorraine's failure to produce Virgil's mental disability hospital records is considered "extrinsic" fraud or fraud on the court. Cecil's appeal relies primarily on Declare v. Yohanan, **supra**, which eliminated any distinction between two separate basis for relief from a judgement under the saving clause: "extrinsic" fraud and "fraud upon the court." Therefore, Cecil has used these two forms of fraud interchangeably. This "extrinsic" fraud or fraud

on the court prevented Cecil his opportunity to present his case in court. In Throckmorton v. U.S., 98 U.S. 61 (1878), the United States Supreme Court set forth criteria upon which courts have relied in allowing independent actions to be brought for extrinsic fraud:

> "There is an admitted exception to general rule (that judgments are final) in cases where, by reason by something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue of the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise or compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of plantiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his interest to the other side, these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgement or decree, and open the case for a new fair hearing."

Conclusion

Cecil cites both Fla. R. Civ. P. 1.540(b) and Fed. R. Civ. P. 60(b), which are virtually identical to

ask this court for relief from the final judgments rendered. As grounds for such relief, Cecil's reasons are that Lorraine has committed both "intrinsic and extrinsic" fraud which would make the previously entered judgments or decree's void.

Lorraine's "extrinsic fraud" or fraud on the court for failure to release Virgil's mental disability hospital records: 1) prevented Cecil from presenting his case in court, 2) attributed to Cecil being fraudulently induced to sign the stipulation, and 3) caused the probate court to misinterpret the legal effect of the evidence. Lorraine's "intrinsic fraud" of not revealing the extent of Virgil's estate is an additional issue that should serve as substantial grounds not previously presented for a rehearing.

In Cecil's Petition for Writ of Certiorari, Cecil included a quote from DeClare v. Yohanan, **supra**, in which Florida's Supreme Court defined "fraud on the court" as "falsely promising a compromise." Cecil's position is that the stipulation lacked mutual assent between the parties. McGoey v. State, **supra**. In Throckmorton v. U.S., **supra**, a false promise or compromise was mentioned along with additional reasons to show that there was never a real contest in the case. Cecil feels that due to Lorraine's "extrinsic" fraud of not releasing Virgil's mental history to the court, there was never a real contest in the case.

Cecil has copies of correspondence between Mr. Edenfield and Mr. Rydberg that would indicate Mr. Edenfield was only interested in settling the case. Seven days after Mr. Edenfield filed a motion to produce Virgil's medical records, a stipulation was presented for Cecil to sign. No other intestate heir

signed this document. Since no other intestate heir signed this stipulation, this court should note that this document was prepared in haste and for the purpose of not producing Virgil's medical history to the court. Cecil again cites McGoey v. State, **supra**, to show this court there was "no meeting of the minds" in regards to the nature and scope of the stipulation entered between the parties.

Cecil asks that this court prevent an erroneous deprivation of his private property rights. Mathews v. Eldridge, **supra**. Cecil asks this court to prevent the unlawful divesting of his property. Matter of Estate of Newland, **supra**. Cecil asks the U.S. Supreme Court to grant his Petition for Rehearing.

Respectfully submitted,

Cecil G. Bailey

Pro Se

July 2010